Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—September Term, 1967.

(Argued October 6, 1967 Decided November 17, 1967.)

Docket No. 30658

UNITED STATES OF AMERICA,

Appellee,

—v.—

EMILIO PIZZARELLO,

Appellant.

Before:

FRIENDLY, HAYS and ANDERSON,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* convicting appellant, after jury verdicts of guilty, of violations of the federal wagering tax laws, 26 U. S. C. §§ 4401, 4411, 4412, and related sections. Affirmed.

JAMES G. STARKEY, Esq., Brooklyn, N. Y., *for Appellant.*

LAWRENCE W. NEWMAN, Assistant U. S. Attorney, Southern District of N. Y. (Robert M. Morgenthau, U. S. Attorney, Douglas S. Liebhafsky and Pierre N. Leval, Assistant U. S. Attorneys, Southern District of New York, on the brief), *for Appellee.*

Opinion of Court of Appeals

PER CURIAM:

An information was filed against Emilio Pizzarello, charging him in two counts of engaging in the business of accepting wagers without paying the special wagering tax, 26 U. S. C. §§ 4401, 4411, 7262, and without registering with the District Director of Internal Revenue, 26 U. S. C. §§ 4401, 4412, and 6262. A jury returned verdicts of guilty, without wilfulness, on both counts and from the judgments of conviction entered thereon, he now appeals.

The principal issue which he presents to this court is whether or not he was illegally arrested. At the pre-trial proceeding the warrant which Agent Riley possessed was held invalid but the validity of the arrest, and the seizure of cash and bet slips found in the appellant's possession were sustained.

In the absence of a valid warrant, an agent of the Internal Revenue Service is authorized to make an arrest for a misdemeanor related to the revenue laws which is "committed in his presence." 26 U. S. C. § 7608(b)(2)(B). Prior to the effective date of that section, this court interpreted a similar statutory authorization contained in § 183 of the New York Code of Criminal Procedure as sanctioning an arrest without a warrant in cases where the observations of the arresting agent are sufficient to induce a reasonable belief that a crime is then and there being committed. *United States* v. *Viale*, 312 F. 2d 595 (2 Cir.), *cert. denied*, 373 U. S. 903 (1963). We see no valid reason why a like construction should not be given the federal statute.

On March 30, 1965, and on seven separate occasions thereafter, including the afternoon of April 15th shortly before the arrest, Riley's fellow Internal Revenue Agent, Ripa, had placed horse race wagers with the appellant in

the back room of Pizzarello's combination luncheonette-stationery store. On each of his visits he observed others there reading scratch sheets or racing programs, writing on slips of paper, and handing these slips along with sums of money to Pizzarello. He had fully recounted these experiences and described what he had observed to Agent Riley, who had been assigned to the case with him. Riley observed Agent Ripa and several others enter the back room on the afternoon of April 15th and Riley himself entered the back room a few minutes later and found Pizzarello, with another man, seated at a desk covered with betting slips, pencils, and scratch sheets. Two men were standing around reading racing forms. What he then observed and what he had been told by his fellow agent, Ripa, furnished reasonable grounds for him to believe that gambling activities were going on. See *United States* v. *Comi*, 336 F. 2d 856, 858 (4 Cir. 1964), *cert. denied*, 379 U. S. 992 (1965); cf., *United States* v. *Elgisser*, 334 F. 2d 103, 110-111 (2 Cir.), *cert. denied*, 379 U. S. 881 (1964). Under these circumstances the arrest was clearly lawful and evidence seized in the search incidental thereto was admissible. *Ker* v. *State of California*, 374 U. S. 23, 41 (1963).

Appellant argues that Agent Riley's observations in the storeroom were the product of a trespass and therefore could not provide the basis for the arrest. Although this room was not "public" to the same degree as the luncheonette, it was obviously open to any person who had the inclination to enter. Agent Ripa had done so on many occasions. On the day of the arrest others were seen going from the luncheonette through a swinging door to the back room without knocking or waiting for permission to enter. There was no sign on the door and no objection was made

when Riley entered. This case is clearly distinguishable from *People* v. *Lund*, 50 Misc. 2d 589, 271 N. Y. S. 2d 164 (Crim. Ct. 1966) on which appellant relies.

We have carefully considered appellant's other contentions, and find them without merit.[1] The judgments are affirmed.

[1] One issue of substance raised by appellant is the constitutional question. However, we refrain from discussing it in view of the fact that it is presently before the Supreme Court in *Marchetti* v. *United States* and *Grosso* v. *United States*, 36 U.S.L. Week 3177 (October 31, 1967), and adhere to the position taken by this court in many cases in which it has refused to find the statute unconstitutional.

Opinion Re Motion to Suppress

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 729

UNITED STATES OF AMERICA,

—against—

EMILIO PIZZARELLO,

Defendant.

MURPHY, D. J.

This is a motion to vacate a warrant of arrest and to suppress evidence.

It is the defendant's claim that the warrant of arrest should be vacated and set aside on the ground that the affidavit in support of it was insufficient and that the evidence that was taken as a result of the arrest should be suppressed on the ground that the arresting officer, assuming the warrant was invalid, did not, under New York law, see the commission of any misdemeanor; and, assuming both arguments are overruled, that $123,017 taken from a safe three hours after defendant's arraignment and $2440 discovered at the same time should be returned as not being the proper subject of a seizure and which neither was or (sic) could be the instrumentality of a crime.

Judge Wyatt has held invalid two identical warrants based on identical affidavits, Tripodi v. Morgenthau, M-18-65 (S.D.N.Y. May 10, 1965); Nannariello v. Morgenthau, M-18-65 (S.D.N.Y. April 28, 1965); the government claims that a subsequent Supreme Court case, Jaben v. United States, 381 U.S. 214 (1965), vitiates Judge Wyatt's

holding and, secondly, that Judge Wyatt was in error even under the old case law.

We conducted a hearing on the assumption that the warrant was invalid and both parties agreed to this procedure.

We agree with the defendant that the complaint upon which the warrant of arrest was issued does not meet the "probable cause" standard required by Rule 4(a). Giordenello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, 378 U.S. 108 (1964). Jaben v. United States, 381 U.S. 214 (1965) does not fashion any new or different rule. In fact it reaffirms "that a magistrate is intended to make a neutral judgment that resort to further criminal process is justified. A complaint must provide a *foundation* for that judgment. It must provide the affiant's answer to the magistrate's hypothetical question, 'what makes you think that the defendant committed the offense charged?" . . . It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and *are sufficiently supported* to justify bringing into place the further steps of a criminal process." Id. at 224-25. (Emphasis added.)

The instant complaint merely accuses the defendant in the words of the statute, i.e., "on or about the 14th day of April, 1965, in the Southern District of New York (the defendant) was engaged in the business of accepting wagers (or) in receiving wagers for and on behalf of the person engaged in the business of accepting wagers unlawfully, wilfully and knowingly failed to pay the special tax imposed by Title 26 U.S.C. § 4411."

As a basis for this charge, which by itself obviously would be insufficient, it gave the following information to the commissioner for him to make a judgment that the charges were not capricious and were sufficiently supported. The commissioner was told (1) that the agent had made investigations in his official capacity; (2) that another agent had made a statement that he had placed wagers with the

defendant, and (3) that a search of official records disclosed that the defendant failed to pay the tax.

In our opinion it was impossible for the commissioner to make a judgment that the charges were not capricious because he was furnished no information that supported the charges. He was not told one word about what investigations the affiant had made and whether they concerned this defendant. He was not told when the other agent had placed wagers or where and under what circumstances or how many, so that one could infer that the defendant was engaged in the *business* of accepting wagers or in receiving wagers for and on behalf of a person in the *business* of accepting wagers so as to exclude purely social or friendly type of wagers. Cf. United States v. Simon, 241 F.2d 308, 310 (7th Cir. 1957).

The federal crime is the wilful failure to pay the special tax, but the agent furnished no supporting information that the special tax was due. Lastly, the commissioner could very well have asked, since there was no supporting information, how an official record could be searched when the agent had neither the name nor the address of the defendant. The affidavit merely described the defendant as John Doe No. 1, a white male approximately 45 to 50 years of age, 5′ 10″ tall, 180 lbs., stocky build, thin grey mustache, grey black hair.

Accordingly, we agree with Judge Wyatt and the warrant of arrest is vacated.

The arresting officer (not the one who made the return on the warrant) testified that he had been informed by an undercover agent who had made two bets with the defendant on the day before, viz., April 14, 1965, what the defendant looked like, where he sat in the back room of a luncheonette, how racing forms would be available at the desk where the defendant sat and how slips of 3″ x 5″ paper were available upon which the bettor was made to write out his bet and how other people would be standing

around reading racing forms and newspapers opened to the racing news.

Briefed with this information he entered the back room of the luncheonette and saw the defendant sitting at a desk and another man sitting in front of him, the various racing forms and small slips of paper and, accordingly, arrested the defendant. He later testified he knew that defendant had not paid the tax because the official records disclosed only one person, not the defendant, had paid the tax. He took some $425 from his person and some betting slips. When a safe was discovered behind some cartons in the rear of the room the defendant professed that it was not his safe but his sister's and she was in California at some unknown place and he did not know the combination. Other people were arrested and all were brought to this courthouse for arraignment. About 6:30 P.M. (three hours later) the Treasury Department had a locksmith open the safe and a large sum of money ($123,017) was found in it, mostly in $100 bills, and this was seized, and also during this latter search an agent found $2440 and three bundles of bets wrapped up in racing forms concealed under the lip of a table. It was his testimony that these bets related to the dates just preceding the arrest and corresponded to races that were held on those respective dates.

The warrant being vacated the next issue is whether under these facts the arresting officer as a "private person" saw the defendant commit or attempt to commit a misdemeanor in his presence. N.Y. Code of Criminal Procedure, § 183; United States v. Viale, 312 F.2d 595 (2d Cir. 1963).

In *Viale* the arresting officer was held to have had reasonable cause to believe that Fino and Pinavia, who were using telephones when the agents entered the room, were engaged in the business of accepting wagers illegally since the agents knew that no one from those premises had paid the tax or registered or filed a return. It is pointed out that the agents knew from undercover agents that Viale

and confederates were engaged in the business of accepting wagers. On entering they saw the defendants, Fino and Pinavia, in a second floor room equipped with four telephones, betting slips, racks and other paraphernalia appropriate for a wagering hideout. What was being said on the telephone does not appear, nor are the racks or other paraphernalia further described.

Since the Court of Appeals found it *easy* to hold that the arresting agent had reasonable cause to believe that the appellants were engaged in the business of accepting wagers illegally we, too, find that this defendant was engaged in the business of accepting wagers illegally but, admittedly, we do not make the finding as easily as the Court of Appeals did in *Viale*. We can readily equate a back room of a luncheonette with a second floor room in *Viale* and following the example of *Viale* find that the position of the defendant at the table, the presence of the 3" x 5" slips, the presence of racing forms, the presence of other men with newspapers opened at the racing news, are in essence the equivalent of the presence of racks and other paraphernalia. In total, therefore, just the telephones are missing and that seems to be unimportant, or at least not too important, since in *Viale* we were not told what was being said.

We hold, accordingly, that the arresting agent as a private citizen must have perceived indications of the commission of an offense sufficient to induce reasonable belief of the fact. He was aware at that time of the commission of a crime—a misdemeanor.

This holding only solves some of the problems, viz., that the arrest, the search of defendant's person, the seizure of the $425 in cash and the ten betting slips were legal and incidental to a lawful arrest. But the search was more extensive and productive.

As we said above, some three hours after the defendant has been arraigned further searches were conducted result-

ing in seizure of $123,017 in currency which was taken from a locked safe and $2440 plus betting slips which were found secreted under a table. These seizures we hold were illegal, Preston v. United States, 376 U.S. 364 (1964), and most recently James v. Louisiana, 34 U.S.L. Week 3131 (U.S. October 19, 1965), and may not be used in evidence against the defendant.

But the defendant asks for further relief, viz., not only the suppression but the return of this illegally seized evidence. We have no problem with the money and the slips found on defendant's person and deny so much of the motion out of hand. Abel v. United States, 362 U.S. 217 (1960). As to the rest it is the government's claim that even if the balance was illegally seized it cannot be returned because § 7302 of Title 26 U.S.C. declares them to be forfeited. That section provides, "It shall be unlawful to have or possess any property intended for use in violating the provisions of the Internal Revenue laws . . . or which has been so used, and no property rights shall exist in any such property." We see no difficulty in holding that the $2440 and the betting slips all bound together and secreted under the table can be held, at least for this motion, to be within § 7302 but have trouble, because of the absence of any facts, as to the money taken from the safe. We are not told who owns it, how it was used or why it was in the safe. But at this juncture on this motion we will honor the claim of the government that it is subject to forfeiture and relegate the defendant or the owner, if it is a different person, to the remedies provided by law. See §§ 7323, 7327 of Title 26; United States v. Grossman, 315 F.2d 94 (2d Cir. 1963); United States v. $1,058 in U.S. Currency, 323 F.2d 211 (3d Cir. 1963). Accordingly, that part of defendant's motion seeking the return of such moneys is denied but on condition that the government commence a libel for its forfeiture on or before November 1, 1965. As to defendant's motion to suppress certain un-

described oral admissions or statements made by defendant at the time of his arrest it is denied because it is premature. United States v. Klapholtz, 230 F.2d 494, (2d Cir. 1956), cert. denied, 351 U.S. 924.

This is an order. No settement is necessary.

THOMAS F. MURPHY
U. S. D. J.

Dated, New York, N. Y., October 25, 1965.

Opinion Re Motion to Reargue

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 729.

UNITED STATES OF AMERICA,

—against—

EMILIO PIZZARELLO,

Defendant.

Memorandum

MURPHY, D. J.

The cross motions to reargue, both dated October 28, 1965, are granted and on reargument our decision of October 25, 1965, is adhered to.

Defendant's post-decision argument that there was a trespass is not supported by the testimony nor was it even suggested by cross-examination.

The government's argument that the discovery of the money in the safe and the additional money and betting slips was one hour after defendant's arraignment, and not three as we held, might very well be the fact, which we accept, but 6:30 P.M. was five hours after defendant was arrested by Agent Riley and some three hours after he had been removed from the premises. This time spread and defendant's absence, in our opinion, makes Preston v. United States, 376 U.S. 364 (1964) controlling.

These are orders. No settlements are necessary.

/s/ THOS. F. MURPHY,
U. S. D. J.

Dated, New York, N. Y., November 4, 1965.

Wagering Tax Statutes

26 U.S.C. § 4401.

§ 4401. *Imposition of Tax.*

(a) *Wagers.*

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of wager.*

In determining the amount of any wager for the purpose of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer established, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. . . .

Wagering Tax Statutes

26 U.S.C. § 4411.

§ 4411. *Imposition of tax.*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. . . .

26 U.S.C. § 4412.

§ 4412. *Registration.*

(a) *Requirement*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

26 U.S.C. § 7203.

§ 7203. *Willful failure to file return, supply information, or pay tax.*

Any person required under this title to pay an estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than

a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 7262.

§ 7262. *Violation of occupation tax laws relating to wagering—failure to pay special tax.*

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000,

26 U.S.C. § 7272.

§ 7272. *Penalty for failure to register.*

Any person (other than persons required to register under subtitle E, or persons engaging in a trade or business on which a special tax is imposed by such subtitle) who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.